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No. 07-478

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In The
Supreme Court of the United States

DETLEF F. HARTMANN,

Petitioner,

v.

ELIZABETH BURRIS, Acting Warden,
Delaware Correctional Center,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Elizabeth Burris, Acting Warden of the Delaware Correctional Center, respectfully asks this Court to deny the petition seeking review of the July 9, 2007 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is officially reported at 492 F.3d 478. The decision of the district court (Pet. App. 14a-28a) is not officially reported but is available at 2004 WL 2713104.

JURISDICTION

The judgment of the court of appeals was entered July 9, 2007. The petition for a writ of certiorari was filed on October 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Section 2244(d)(1) of Title 28 "requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year." *Evans v. Chavis*, 546 U.S. 189, 191 (2006). The limitations period is tolled for the "time during which a properly

filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. §2244(d)(2). Petitioner, in March 2001, pled guilty to three felony sex offenses and was sentenced to 19 years imprisonment, suspended after 10 years imprisonment for 7½ years supervised release and probation. Petitioner applied for federal habeas relief in August 2003. The district court denied the petition, holding that the petition was untimely, being filed outside the one year limitations period established by §2244(d)(1). The court of appeals affirmed. Pet. App. 1a-13a.

1. Delaware State Police in late 1999 investigated a report that a minor girl had been sexually abused by her two brothers. When the girl's 13-year-old brother, A.C., was asked where he had learned this behavior, he revealed that he had learned the acts from petitioner the previous summer. A.C. had been introduced to petitioner while at church and, with the permission of his father, A.C. agreed to do odd jobs for petitioner in the summer of 1998 to make spending money. One incident of sexual activity between A.C. and petitioner had occurred in a state park where the two were jogging; three incidents occurred in the bathroom at petitioner's house; the fifth incident occurred in the living room of petitioner's house, petitioner also filming the various sexual acts that time. A subsequent search of petitioner's computer revealed 150 pictures police suspected to be child pornography. Gov't C.A. Brf. at 5-6.

Petitioner was arrested on December 1, 1999, and a state grand jury indicted him in February 2000, charging him with multiple counts of first degree unlawful sexual intercourse, sexual exploitation of a child, second degree unlawful sexual contact, sexual solicitation of a child, dealing in child pornography, and possession of child pornography. Petitioner pled guilty on March 29, 2001 to one count of second degree unlawful sexual intercourse and two counts of second degree unlawful sexual contact. Consistent with the plea agreement, petitioner was sentenced that same day to a total of 19 years imprisonment, suspended after 10 years for 7½ years supervised release and probation. Gov't C.A. Brf. at 3.

On June 29, 2001 and again on July 26, 2001, petitioner filed motions for sentence reconsideration, reduction, or modification under Delaware Superior Court Criminal Rule 35(b) (reproduced at Pet. App. 33a). Those motions were denied on June 25, 2002; petitioner did not appeal that decision to the state supreme court. On November 12, 2002, petitioner filed a "motion to dismiss" in the state trial court, alleging that the court had not had jurisdiction over the charges in the indictment and that counsel had been ineffective in failing to discern and pursue the jurisdictional defect. The trial court struck the motion on November 19, 2002, finding the motion to dismiss to be procedurally improper. On March 20, 2003, the state supreme court affirmed the November 19, 2002 order of the trial court striking petitioner's motion to dismiss. Pet. App. 2a-3a & n.2.

2. Petitioner applied for federal habeas relief in a petition dated August 4, 2003, advancing five claims for relief. Pet. App. 15a-16a. The district court denied petitioner's application for federal habeas relief, holding that the petition was untimely under 28 U.S.C. §2244(d)(1).

a. Petitioner was sentenced on March 29, 2001, and under state law, he had 30 days to file an appeal to the state supreme court. Petitioner's convictions thus became final on April 30, 2001. Under §2244(d)(1)(A), therefore, petitioner had until April 30, 2002 in which to file his habeas petition. The habeas petition was dated August 4, 2003, and that presumably was the date petitioner had delivered the petition to prison officials for mailing. The petition was accordingly deemed filed August 4, 2003. Pet. App. 18a-19a.

b. The statutory tolling provision of §2244(d)(2) did not save petitioner's application. The district court decided that it need not resolve the question of whether petitioner's motions for reduction of sentence had tolled the limitations period under §2244(d)(2). If the motions for reduction of sentence did in fact toll the limitations period, petitioner's federal habeas petition was still untimely. Pet. App. 20a. The November 2002 motion to dismiss, instead, did not toll the limitations period because it was not "a 'properly filed' application for state post-conviction relief." Pet. App. 20a-21a. Finally, there was no basis upon which the limitations period could be equitably tolled. Pet. App. 21a-25a.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court rejected petitioner's contention that the motion to reduce his sentence triggered the tolling provision of §2244(d)(2). A motion to reduce sentence under Delaware law, according to the court, was "a plea for leniency, directed toward the sentencing court, which seeks discretionary relief based on mercy and grace, rather than on the law." Pet. App. 7a. Indeed, the trial court could reduce a defendant's sentence "'without regard to the existence of a legal defect.'" Pet. App. 7a (quoting *State v. Lewis*, 797 A.2d 1198, 1201 (Del. 2002)). Conversely, a Delaware prisoner was not required to seek a reduction of sentence in order to challenge his conviction or sentence. Pet. App. 8a.

Looking at its earlier decision in *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), the court wrote that application of the tolling provision of §2244(d)(2) had been appropriate in *Nara* "because the [prisoner's] motion attacked the lawfulness of [his] conviction. . . ." Pet. App. 9a. Petitioner's motion to reduce his sentence was simply "a state court proceeding that is not attacking the lawfulness of the conviction or of the sentence." Pet. App. 9a. Because petitioner's motion to reduce his sentence had not challenged the validity of his conviction or of his sentence, there was no basis to apply the tolling provision of §2244(d)(2). The court noted that three other courts of appeals had considered the same question. Analyzing those decisions, the court noted its conclusion was consistent with that reached by the Fourth and Eleventh Circuits,

but contrary to that reached by the Tenth Circuit, the court "not [being] persuaded by the reasoning of the Tenth Circuit." Pet. App. 9a-11a (citing *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001); *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002); *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006); *Howard v. Ulibarri*, 457 F.3d 1146 (10th Cir. 2006)). The court moreover determined that "tolling for a leniency petition" (Pet. App. 11a) would not further the purpose of the exhaustion requirement or other goals "such as comity and the desire to avoid simultaneous litigation. . . ." Pet. App. 11a-12a.[1]

ARGUMENT

Petitioner contends that this Court should grant review to resolve the conflict among the courts of appeals on the question whether a defendant's motion to modify or reduce his sentence is an "application for State post-conviction or other collateral review" under §2244(d)(2) that tolls the one year limitations period

[1] The court of appeals observed that prisoners might be inclined "to file frivolous requests for leniency merely as a delay tactic." Pet. App. 12a (citing *Lawrence v. Florida*, 127 S.Ct. 1079, 1085 (2007)). According to petitioner, that concern is overdone because of the short periods of time within which a motion for reduction of sentence must be filed. Pet. 15. That might be true with respect to motions to reduce a sentence of imprisonment, but the Delaware rule allows a prisoner to move to modify or reduce the "term or conditions of partial confinement or probation, at any time." Pet. App. 33a.

established by §2244(d)(1). The court of appeals correctly held that a motion for reduction or modification of sentence does not trigger the tolling provision of §2244(d)(2), and the conflict identified by petitioner does not warrant review at this time.

1. a. "Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Carey v. Saffold*, 536 U.S. 214, 223 (2002) (citing *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946) and *Dep't of Banking of Neb. v. Pink*, 317 U.S. 264, 268 (1942)). *See Summers v. Schriro*, 481 F.3d 710, 714 (9th Cir. 2007) ("the determinative factor is how [the particular Arizona procedure] functions in the Arizona criminal justice system"); *Voravongsa v. Wall*, 349 F.3d 1, 4 (1st Cir. 2003), *cert. denied*, 541 U.S. 963 (2004) (citing *Carey*, 536 U.S. at 223 and *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). That is exactly how the court of appeals proceeded to analyze petitioner's case: reviewing Delaware law, the court distinguished a motion to reduce or modify a sentence from state procedures that allow a prisoner to challenge his conviction or sentence because of a legal flaw in the proceedings. Pet. App. 7a.[2] And writing in

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[2] *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("as we have repeatedly recognized, the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit") (citing cases); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

2002, the Delaware Supreme Court could hardly have been more clear about the difference: Superior Court Criminal "Rule 61 addresses post-conviction relief, which requires a legal challenge to the conviction, whereas Rule 35(b) allows a reduction of sentence, without regard to the legality of the conviction." *State v. Lewis*, 797 A.2d 1198, 1200 (Del. 2002). *See id.* at 1201 ("Rule 35(b) allows for a reduction of sentence without regard to the existence of a legal defect."). A motion for reduction of sentence under Delaware law thus "does not meet any of the established standards of collateral attack." *United States v. Addonizio*, 442 U.S. 178, 186 (1979). *See id.* at 185-86 (categorizing types of errors that come within scope of collateral attack).

This understanding of Delaware criminal procedure was entirely consistent with the view held by the courts of appeals of Federal Rule of Criminal Procedure 35(b) before that rule was amended by the Sentencing Reform Act of 1984. A motion for reduction of sentence was seen as being a plea for leniency, not a challenge to the legality of the conviction or the sentence. *United States v. Cumbie*, 569 F.2d 273, 274 (5th Cir. 1978); *United States v. Maynard*, 485 F.2d 247, 248 (9th Cir. 1973); *United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968); *United States v. Sobell*, 314 F.2d 314, 331-32 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) ("It would be quite improper for this Court, by utilizing Rule 35 to reduce Sobell's sentence, to place the Government in the same position as if the issue had been

submitted to the jury and decided in his favor."); *Poole v. United States*, 250 F.2d 396, 401 (D.C. Cir. 1957) (motion for reduction of sentence "is essentially a plea for leniency and presupposes a valid conviction. [Citation omitted.] It is wholly inadequate to test the propriety of allowing a guilty plea to stand.").

b. Section 2244(d)(2) tolls the limitations period for the "time during which a properly filed application for State post-conviction or other collateral review . . . is pending." "[W]ith this language, Congress meant to include within the scope of §2244(d)(2) those 'properly filed' applications, without respect to state nomenclature or the nature of the petitioner's state confinement, that, pursuant to the wording of §2244(d)(2), seek 'review' of the 'pertinent judgment or claim.'" *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). The claims advanced in the state proceedings need not mirror those eventually presented in a federal habeas corpus petition,[3] but to come within the terms of §2244(d)(2), the state proceeding has to challenge the validity of the conviction or the sentence. *Sibley v. Culliver*, 377 F.3d 1196, 1200 (11th Cir. 2004) (quoting *Voravongsa*, 349 F.3d at 6). That point was emphasized by the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d 234 (4th Cir. 2001) when the court held that a motion for reduction of sentence under West Virginia law did not act to toll, under

[3] *E.g., Cowherd v. Million*, 380 F.3d 909 (6th Cir. 2004); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema v. Long*, 253 F.3d 494, 502 (9th Cir. 2001).

§2244(d)(2), the limitations period: a "collateral" proceeding typically challenged "the legality of the earlier proceeding or judgment," but a motion for reduction of sentence "does not allege any error at all." 272 F.3d at 238. Similarly, the Eleventh Circuit in *Bridges v. Johnson*, 284 F.3d 1201 (11th Cir. 2002), concluding that "'sentence review is not an attack on the constitutionality or legal correctness of a sentence or judgment,'" 284 F.3d at 1204, held that proceedings before a state sentence review panel did not toll the limitations period. The court of appeals in petitioner's case correctly determined that the dispositive question was whether his motion for reduction of sentence required the state courts to "review" his conviction or sentence. Because petitioner's motion for reduction of sentence did not challenge the validity of his conviction or sentence, that motion did not trigger the tolling provision of §2244(d)(2).

2. The Tenth Circuit, as the court of appeals noted (Pet. App. 10a-11a) and as petitioner describes (Pet. 7), has decided that motions for reduction of sentence do trigger the tolling provision of §2244(d)(2). But the position of the Tenth Circuit is less clearcut than portrayed by petitioner. Notwithstanding its holdings in *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006) and *Howard v. Ulibarri*, 457 F.3d 1146 (10th Cir. 2006), the Tenth Circuit has concluded that the sentence reduction or modification procedure available under Oklahoma law does not toll the limitations period. *Clemens v. Sutter*, 230 Fed. Appx. 832, 834 n.1 (10th Cir. 2007); *Heinken v. Higgins*, 175

Fed. Appx. 986, 988 n.2 (10th Cir. 2006); *Williams v. Beck*, 115 Fed. Appx. 32, 33 (10th Cir. 2004). Given the disparate views evidenced by the Tenth Circuit's several decisions on the issue, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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